Board of Alien Labor Certification Appeals
United States Department of Labor
Washington, D.C.

DATE: August 19, 1998
CASE NO: 98-INA-014

In the Matter of:

KACHINA COUNTRY DAY SCHOOL
Employer

On Behalf of:

NIELS J.D. ANDERSEN
Alien

Appearance: Roxana C. Bacon, Esq.
Phoenix, AZ
For the Employer and Alien

Before: Holmes, Vittone, and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. §656.26 (1991) of the denial by the United States Department of Labor Certifying Officer ("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (5) of the Immigration and Nationality Act of 1990, 8 U.S.C. §1182 (a) (5) (1990) ("Act"). The certification of aliens for permanent employment is governed by §212 (a) (5) (A) of the Act, 8 U.S.C. §1182 (a) (5) (A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212 (a) (5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the

place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties. §656.27 (c).

Statement of the Case

In 1995, Kachina Country Day School ("employer") filed an application for labor certification to enable Niels J.D. Andersen ("alien") to fill the position of European Studies Teacher (AF 83). The job duties are described as follows:

> The Kachina School requires the services of a Lead Teacher in its European Studies program, including Social Studies, literature and languages. The Teacher will also teach German at the high school level and French at the elementary grade level (AF 83).

The specified job requirements are a Bachelor's degree in languages and fluency in German and French.

On July 3, 1996, the CO issued a Notice of Findings, proposing to deny the labor certification. The CO first cited a violation of §656.24 (b) (2) (ii) which provides that the CO shall consider a U.S. worker able and qualified for the job opportunity if the worker by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation. The CO noted that based on a review of their resumes, Applicants DeeDee Engdahl and Hsiang-Hung Cindy Todd appeared qualified for the position (AF 70). The CO also cited a violation of §656.21 (b) (2) (i) which provides that the employer shall document that the job opportunity is described without unduly restrictive job requirements. The job opportunity's requirements, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States. Specifically, the CO objected to the employer's requirement that all candidates possess fluency in German and French.

Finally, in the NOF, the CO determined the employer was in violation of §656.3 which defines "employer" as a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment. Noting that the school had no instructors teaching German and French prior to applying for certification, the CO challenged whether the employer actually had a current job opening to which U.S. workers could be referred. The CO therefore found that the school created the position for the alien.

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[1] All further references to documents contained in the Appeal File will be noted as "AF."

In rebuttal, dated August 4, 1996, the employer argued that Applicants Engdahl and Todd were not qualified for the position. The employer contended that Applicant Engdahl was not fluent in German and Applicant Todd lacked fluency in French. The employer also argued that the French and German language requirements were justified by business necessity. The employer explained that it added these languages to the European Studies curriculum to keep pace with other secondary schools which offer these languages. Finally, the employer argued that the school has operated for nearly thirty years and provides permanent, full-time employment to which U.S. workers can be referred. The school provided copies of incorporation records, unemployment tax and wage reports, tax returns, an advertisement, a policy and procedure manual, and a brochure.

The CO issued the Final Determination on October 30, 1996, denying the certification application. The CO found the employer failed to rebut the issues raised in the NOF (AF 6). On December 2, 1996, the employer requested review of Denial of Labor Certification pursuant to §656.26 (b) (1) (AF 1).

Discussion

The issues presented by this appeal are whether the foreign language requirements are unduly restrictive under §656.21 (b) (2); whether the employer offered lawful, job-related reasons for rejecting Applicants Engdahl and Todd under §656.21 (b) (6); and whether the employer provided a bona fide job opportunity to which U.S. workers could be referred pursuant to §656.3.

It must first be decided whether the employer's foreign language requirements are unduly restrictive under §656.21 (b) (2). Section 656.21 (b) (2) proscribes the use of unduly restrictive job requirements in the recruitment process. Unduly restrictive requirements are prohibited because they may have a chilling effect on the number of U.S. workers who apply for or qualify for the job opportunity. The purpose of §656.21 (b) (2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc*). A job opportunity has been described without unduly restrictive requirements where they do not exceed those defined for the job in the DOT and are normally required for a job in the United States. *Ivy Cheng*, 93-INA-106 (June 28, 1994); *Lebanese Arak Corp.*, 87-INA-683 (Apr. 24, 1989) (*en banc*).

Section 656.21 (b) (2) (i) (c) explicitly provides that a job opportunity shall not include a requirement for a language other than English unless that requirement is adequately documented as arising from business necessity. The two-pronged business necessity standard of *Information Industries*, 88-INA-82 (Feb. 9, 1989) (*en banc*) is applicable to foreign language requirements. First, the employer must show that the requirement bears a reasonable relationship to the occupation in the context of the employer's business. Second, the employer must demonstrate that the requirement is essential to performing, in a reasonable manner, the job duties. The first prong of the test establishes a link between the job requirements and the employer's business. For example, with a foreign language job requirement, it is helpful to show the amount of the employer's business which involves foreign-speaking clients or use of the foreign language. The

second prong of the test ensures that the job requirement is related to the job duties which the employee must perform. For instance, with a foreign language requirement, it is important to show that the employee communicates or reads in the foreign language while performing the job duties.

In this case, the employer argued that the German and French fluency requirements arise from business necessity because the incumbent will instruct students in these languages. The employer stated that language requirements are customarily mandated for European Studies and Language instructors. The school further contended that German and French were added to the curriculum because these languages are typically taught at the secondary school level. The school thus argued that it is merely trying to keep pace with other schools that offer similar educational programs. The employer explained that by adding these classes, students will be able to test for advanced placement college credit for these two languages.

In support of the business necessity argument, the employer provided an affidavit from Dr. Nicholas Vontsolos who has a Ph. D. in Language from Ohio State and extensive foreign language teaching experience at the college and high school level. He stated that fluency is a necessity for language teachers: "In all my years of teaching foreign languages and directing programs in which foreign languages are taught, at all levels of instruction, I have never heard of anyone question the requirement that a teacher of a foreign language should be fluent in the language he/she is teaching." (AF 27). After reviewing the requirements for the offered position, Dr. Vontsolos concluded that they are essential for the reasonable performance of the job (AF 30).

In an effort to refute the CO's finding that the requirements were tailored to meet the alien's qualifications, the employer provided an affidavit from Mr. Mark Vite, a coordinator at the school. In the affidavit, Mr. Vite stated that the alien was selected purely on an objective basis and that the languages were added to the curriculum prior to the school's selecting the alien to fill the position (AF 14).

Based on this evidence, we find the employer has demonstrated business necessity for the language requirements. Dr. Vontsolos, who possesses more than 26 years of experience teaching foreign languages, concluded that the fluency requirements were not only reasonable but absolutely necessary for the position (AF 28). Moreover, it was entirely speculative for the CO to conclude that the position was tailored to meet the alien's qualifications, particularly since fluency is a standard requirement for foreign language instructors. Moreover, Mr. Vite stated that the German and French classes were added to the European Studies curriculum before the school selected the alien for the job (AF 14). Therefore, we find the employer has met the *Information Industries* standard by demonstrating that the fluency requirements are essential to performing the job duties in a reasonable manner.

The CO also denied certification on the grounds that the employer failed to provide lawful, job-related reasons for rejecting two U.S. applicants. The Board has held that an applicant

is to be considered qualified for a job if he or she meets the minimum requirements specified for that job in the labor certification application. *United Parcel Service*, 90-INA-90 (Mar. 28, 1991); *Microbilt Corp.*, 87-INA-635 (Jan. 12, 1988). Moreover, the Board has held that an employer unlawfully rejects a U.S. worker who satisfies the minimum requirements specified on the ETA 750A and in the advertisement for the position. *Sterik Co.*, 93-INA-252 (Apr. 19, 1994); *American Cafe*, 90-INA-26 (Jan. 24, 1991); *Cal-Tex Management Services*, 88-INA-492 (Sept. 19, 1990); *Richco Management*, 88-INA-509 (Nov. 21, 1989); *Dharma Friendship Foundation*, 88-INA-29 (Apr. 7, 1988).

In this case, the employer argued that it lawfully rejected two U.S. applicants because they were not qualified for the teaching position. The employer stated that the school denied employment to Ms. Dee Engdahl because she is not fluent in German and Ms. Hsiang-Hung Cindy Todd because she is not fluent in French. The employer explained that the incumbent will teach both German and French. Without fluency in both languages, the employer maintained that the applicant would be unable to perform the core duties of the job (AF 85). In this instance, we agree with the employer and hold that the employer provided lawful reasons for rejecting these two U.S. applicants. As noted by the employer, the labor certification application specifically mandated that applicants possess fluency in German and French. Because these two applicants do not possess these stated minimum requirements, we find they were lawfully rejected.

The final issue to be decided is whether the employer provided a bona fide opportunity to which U.S. workers could be referred pursuant to §656.3. Under §656.3, employment is defined as permanent full-time work by an employee for an employer other than oneself. The employer bears the burden of proving that the position is permanent and full-time, and if the employer fails to meet this burden, certification may be denied. *Gerata Systems America, Inc.*, 88-INA-344 (Dec. 16, 1988). In the Notice of Findings, the CO questioned whether the employer operated an on-going business which provided permanent, full-time employment.

In rebuttal, the employer argued that it has operated the school on an on-going basis for nearly 30 years (AF 7). The employer submitted several exhibits, including copies of the following: State of Arizona articles of incorporation, tax and wage reports, tax returns, a yellow pages advertisement, a policies and procedure manual, and a brochure for the school. The records from the State of Arizona show that the employer incorporated on June 30, 1980 (AF 32). The tax and wage reports demonstrate that the school has 53 part-time and full-time workers, and the tax returns show a total revenue of more than $1.1 million in 1994 (AF 35, 36). The advertisement indicates that the school offers various academic programs throughout the year that are available to students ranging in age from pre-school to high school (AF 51). Based on the evidence, we find the school has successfully demonstrated that it is an employer to which U.S. workers may be referred under §656.3. *Mr. and Mrs. Jeffrey Hines*, 88-INA-510 (where a fact lends itself to proof by independent documentation, the weight and sufficiency of a party's case is bolstered by such documentation). It is noteworthy that the CO offered no explanation why she determined the employer "created the position described to accommodate the alien" (AF 6). Accordingly, we reverse the CO and order that certification be granted.

ORDER

The Certifying Officer's denial of labor certification is hereby **REVERSED.**

For the Panel:

JOHN C. HOLMES
Administrative Law Judge